Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. **77-587**

JEANNE HARR and L. J. HARR for and on behalf of themselves and all others similarly situated,

Petitioners,

v.

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondent.

L. J. HARR, JEANNE HARR, LAWRENCE J. ECHOHAWK, ED FULTON, DIANE FULTON, DON HUTCHISON, C. GERALD PARKER, DONALD DREW, CARRIE DREW, AND DOUGLAS McGREGOR,

Petitioners,

v.

FEDERAL HOME LOAN BANK BOARD an agency of the United States,

Respondent.

PETITION FOR A *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Pursuant to United States Supreme Court Rules 19, 23 and 46, Petitioners[1] jointly pray that a writ of certiorari

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[1]The two groups of petitioners here jointly seeking the writ are (i) Jeanne Harr and L. J. Harr, plaintiffs in Harr v. Prudential Fed. Savs. & Loan Ass'n., 577 F.2d 751 (10th Cir. June 27, 1977), a securities class action, and (ii) L. J. Harr, Jeanne Harr, Lawrence J. Echohawk, Ed Fulton, Diane Fulton, Don Hutchison, C. Gerald Parker, Donald Drew, Carrie Drew and Douglas McGregor, petitioners in Harr v. Federal Home Loan Bank Bd., 557 F.2d 747 (10th Cir. June 27, 1977), an original review proceeding filed in the Court of Appeals.

issue to review two decisions of the United States Court of Appeals for the Tenth Circuit.[2]

OPINIONS BELOW

The order of the United States District Court for the District of Utah dismissing *Harr v. Prudential Federal Savings and Loan Association* (*Prudential* case) is unreported and is set forth at page A-1 of the Appendix to this Petition. The opinions of the Court of Appeals in *Prudential* and in *Harr v. Federal Home Loan Bank Board* (*Bank Board* case) were simultaneously issued and are reported at 557 F.2d 751 and 747, respectively, and reproduced at pages A-3 and A-11, respectively, of the Appendix to this Petition.

In these respective decisions the Court of Appeals (i) affirmed in the *Prudential* case a decision of the United States District Court for the District of Utah dismissing for lack of subject matter jurisdiction the securities class action complaint of Petitions based on Rule 10b-5; and (ii) in the *Bank Board* case dismissed as unmeritorious a Petition for Review of actions of the Federal Home Loan Bank Board filed in the Court of Appeals as an original matter.

JURISDICTION

The decisions of the Court of Appeals for the Tenth Circuit were entered on June 27, 1977. A timely petition for rehearing *en banc* was denied on July 22, 1977. Accordingly, the time for filing this Petition expires on October 20, 1977. This Court's jurisdiction is invoked under 28 U.S.C.A. §1254(1).

[2]Such joint petitions are appropriate where two cases, though different, have their roots in common facts. Affiliated Ute Citizens v. United States, 406 U.S. 128, 141 (1972).

QUESTIONS PRESENTED

1. Whether a Congressional transfer of administration of certain sections of the federal securities laws, including those relating to the preparation and filing of proxy materials, to agencies administering the banking laws, operated to eliminate the right of investors to challenge a materially false and misleading proxy statement.

2. Whether the provisions of the National Housing Act providing for original review in the court of appeals of Federal Home Loan Bank Board orders relating to conversions of federal savings and loan associations from the mutual to stock form of ownership operate to divest the federal district courts of any jurisdiction over violations ~~for~~ of the Securities Exchange Act of 1934 occurring by reason of the use by the converting institution of false and misleading proxy materials.

STATUTES AND REGULATIONS INVOLVED

Section 12(i) of the Securities Exchange Act of 1934, 15 U.S.C.A. §78*l*(i) (1977 Pocket Part):

> In respect of any securities issued by banks, the deposits of which are insured in accordance with the Federal Deposit Insurance Act or institutions the accounts of which are insured by the Federal Savings and Loan Insurance Corporation the powers, functions and duties vested in the [Securities and Exchange] Commission . . . to administer and enforce . . . sections [12, 13, 14(a), 14(c), 14(d), 14(f) and 16] of this title, (1) with respect to national

banks and banks operating under the Code of Law for the District of Columbia are vested in the Comptroller of the Currency, (2) with respect to all other member banks of the Federal Reserve System are vested in the Board of Governors of the Federal Reserve System, (3) with respect to all other insured banks are vested in the Federal Deposit Insurance Corporation, and (4) with respect to institutions the accounts of which are insured by the Federal Savings and Loan Insurance Corporation are vested in the Federal Home Loan Bank Board. The Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board shall have the power to make such rules and regulations as may be necessary for the execution of the functions vested in them as provided in this subsection. In carrying out their responsibilities under this subsection, the agencies named in the first sentence of this subsection shall issue substantially similar regulations to regulations and rules issued by the [Securities and Exchange] Commission . . . . unless they find that implementation of substantially smiilar regulations with respect to insured banks are not necessary or appropriate in the public interest or for protection of investors, and publish such findings, and the detailed reasons therefor, in the Federal Register. Such regulations of the above-named agencies, or the reasons for failure to publish such substantially similar regulations to those of the Commission, shall be published in the Federal Register within 120 days of the date of enactment of this subsection, and, thereafter, within 60 days of any changes made by the Commission in its relevant regulations and rules.

The proxy regulations adopted by the Federal Home Loan Bank Board pursuant to the foregoing statute, which

are substantially identical to those of the SEC[6] at 12 C.F.R. §563b.5(g)(1), provide in part as follows:

> No solicitation of a proxy by the applicant, its management, or any other person for the meeting to vote on conversion shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for such meeting which has become false or misleading.

Sections 402(j), and 408a(k) and (*l*) of the National Housing Act provide in pertinent part:

12 U.S.C.A. §1725(j)(4)(1977 Pocket Part):

> Any aggrieved person may obtain review of a final action of the Federal Home Loan Bank Board or the Corporation which approves, with or without conditions, or disapproves a plan of conversion pursuant to this subsection only by complying with the provisions of subsection (k) of section 1730a of this title....

12 U.S.C.A. §1730a(k) & (*l*):

> (k).... Upon the filing of such a petition, [the Court of Appeals] shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the [Federal Savings and Loan Insurance] Corporation....

[6] *See* 17 C.F.R. 240.14a-9. The complaint in Prudential was based upon the general fraud provisions of Rule 10b-5, 17 C.F.R. 240.10b-5, which have been held to be inclusive of the more specific fraud language of the proxy rules. SEC v. National Sec., Inc., 393 U.S. 453, 468 (1969).

> (*l*) Nothing contained in this section . . . shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of existing law. . . .

STATEMENT OF THE CASE

A. *The Posture of These Two Interrelated Proceedings.*

Petitioners are members of Prudential Federal Savings and Loan Association (Prudential), a federally chartered mutual savings and loan institution. Prudential's management had adopted a plan, subject to appoval by the Federal Home Loan Bank (Bank Board), to convert from a mutual to a stock corporation by means of the exchange of the equity of depositors as of a record date for "free stock" in the Corporation. Following approval by the Bank Board, management solicited member approval of the plan *via* the use of proxy materials alleged by the *Prudential* Petitioners to be materially false and misleading and, therefore, violative of the antifraud provisions of the Securities Exchange Act of 1934 (Exchange Act) and rules promulgated thereunder.[6] The *Prudential* class action sought to enjoin the vote pending an adequate disclosure or, in the alternative, damages.

The Honorable Willis W. Ritter, Chief Judge of the United States District Court for tre District of Utah, dismissed the *Prudential* complaint for lack of subject matter jurisdiction before any responsive pleading was filed

[6]The complaint alleged that the plan was fraudulent and that the proxy statement seeking its approval was false and misleading, relying upon the general antifraud provisions of the Exchange Act contained in Section 10b, 15 U.S.C.A. §78j(b), and Rule 10b-5 thereunder, 15 C.F.R. 240.10b-5. The more specific antifraud provisions of Section 14A of the Exchange Act, 15 U.S.C. §78n(a), administration as to which was transferred to the Bank Board by Public Law 93-495, have been held to be within the scope of Rule 10b-5. SEC v. National Sec., Inc., 393 U.S. 453, 468 (1969). The securities laws have frequently been held to embrace a common purpose and therefor to be in *pari materia.* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963).

concluding that the Court of Appeals had exclusive jurisdiction over all matters relating to the conversion, including Exchange Act challenges to proxy materials, under Sections 402(j) and 408a(k) of the National Housing Act. Judge Ritter's decision was appealed to the United States Court of Appeals for the Tenth Circuit.

Certain others of Petitioners then initiated the *Bank Board* case in the United States Court of Appeals for the Tenth Circuit pursuant to said Sections 402(j) and 408a(k) seeking review on the merits of the Bank Board order authorizing the conversion plan.

Both matters were assigned to the same panel, argued and decided simultaneously. In *Prudential* the panel concluded that the claims that the disclosure of the proxy statement was false and misleading necessarily challenged the Bank Board's order approving the conversion. Accordingly, the panel affirmed the District Court's decision that the only forum available to challenge proxy materials was the review under Section 408a(k). In the *Bank Board* case the same panel, finding no abuse of agency discretion, then rejected both the direct challenge to the order authorizing the conversion and the claims that the proxy materials were misleading. A-15, 17 The Court of Appeals held that the Bank Board's authority to permit the use of the proxy materials derived from the banking laws and not from the securities laws. The Court of Appeals did not review the proxy materials under the disclosure standards of the Exchange Act and its ruling makes clear that no court may do so.

Petitioners seek reversal and remand of the *Prudential* case so that they may proceed with their claims that the proxy materials are false and misleading and that the merits of the conversion plan should be determined by the process of corporate sufferage. The *Bank Board* case is

inextricably intertwined with *Prudential*. All well pleaded allegations of the *Prudential* complaint and inferences therefrom are taken as the facts herein.

B. *The Historical Setting.*

Mutual savings and loan institutions are banking institutions in which the depositors are also pro-rata owners of an equity interest in the company. Federal chartering of such institutions was authorized by Congress in 1933[7] as part of an effort to free home owners from oppressive mortgages and to give them some voice in the financial policies of their lending institutions. Members in such institutions have the right to vote on its affairs and their equity interests in the company have been held to constitute a "security" within the meaning of the Exchange Act.[8]

In the 1950's and early 1960's a trend to "convert" these mutual institutions to conventional stock corporations developed. Such conversions were possible because of 1948 amendments to provisions of Section 5(i) of the Home Owner's Loan Act[9] which gave the Bank Board authority to permit and regulate them. Several methods were used to effect these conversions, including the distribution of "free stock" to members as of a certain date in consideration of their pro-rata equitable interest in the association, as well as the public sale of stock, the proceeds of which are intended to strengthen the institution by increasing its capital. Regardless of the method used, the justifications given for such conversions generally were that the mutual form was not sufficiently liquid

[7] *See* Section 5 of the Home Owners Loan Act, 12 U.S.C.A §1464(b)(i).

[8] Tcherepnin v. Knight, 389 U.S. 322 (1967).

[9] 12 U.S.C.A. §1464(i). *See also* 12 U.S.C.A. §1725(j)(3) (1977 Pocket Part) which permits converting corporations to retain their federal charter.

to permit the most flexible use by the owners of the enormous equity that these institutions had accumulated, such as in bonus or incentive programs for management or in attracting additional equity capital in the securities markets, and that the need of the mortgage market for additional financing suggested that these institutions could better serve the public if they could raise additional money through stock offerings.[10]

From 1963 through 1976 the Bank Board imposed and Congress maintained a moratorium on conversions because of unfortunate experiences in which the assets of converting institutions had been appropriated to the benefit of insiders.[11] The Prudential plan was adopted during a brief period in 1972 when the Bank Board was accepting "test" applications. After a long period of study, during which the Bank Board and Congress concluded that free stock plans such as that of Prudential herein were inherently unfair to members, the moratorium was lifted by Public Law 93-495.[12] In lifting the moratorium Congress required that the Bank Board take precautions against further abuse of the process. Conversions then resumed under new regulations prohibiting "free stock" plans. However, during the period leading to the passage of Public Law 93-495, Prudential and six other institutions that had filed "test" applications prevailed on Congress to authorize the Bank Board to process their plans under the

[10] *Hearings Before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs*, 93rd Cong. 2d Sess. 46-49 (1974) (Statement of Thomas R. Bomar, Chairman of the Federal Home Loan Bank Board).

[11] Following the 1948 amendments to Section 5(i) of the Home Owners Loan Act, 12 U.S.C.A. §1464(i), permitting such conversions, a national scandal arose because in most cases the net worth of the converting institutions was appopriated for the benefit of insiders. This history is reviewed at S. REP. NO. 93-902, 1974 U.S. CODE CONG. & ADMIN. NEWS 6119, 6136-38.

[12] 88 Stat. 1503 (1974).

former regulations as an "experiment" to see if free stock plans could be conducted fairly.

Public Law 93-495 was passed in 1974. Among that law's provisions was one amending Section 12(i) of the Securities Exchange Act of 1934 (15 U.S.C.A. § 78*l*) to transfer *administration* of certain of the Exchange Act's provisions, including those on proxies, which formerly had been administered by the Securities and Exchange Commission (SEC), to the Bank Board. Similar transfers had been made to other federal banking supervisory agencies in 1964.[13] However, the 1974 amendment to section 12(i) not only added the Bank Board to the list of other federal banking agencies administering certain provisions of the Exchange Act; it also added an express proviso that required all such agencies in administering the proxy provisions of Section 14 of the Exchange Act (15 U.S.C.A. §78n) to adopt regulations substantially similar to those of the SEC.

C. *The Prudential Plan.*

The Board of Directors of Prudential adopted a plan to convert from the mutual to the stock form of ownership on July 13, 1972, pursuant to regulations of the Bank Board then in effect. The plan provided for the issuance of free stock to members as of the July 13, 1972 record date. Notice was given to members in August of 1972 that a plan had been adopted and that it could be examined at Prudential's offices, but information concerning the plan's provisions was not circulated until January 16, 1976 when it was disclosed by means of a proxy statement soliciting the member's vote to approve it.

[13]The Comptroller of Currency, Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation had such authority conferred on them as to their member banks by 1964 amendments to Section 12(i).

Following the lifting of the moratorium, and pursuant to Public Law 93-495, Prudential's application for conversion and to circulate proxy materials soliciting the approval of its members was processed by the Bank Board. By the date of the proxy statement, 3½ years after the plan's adoption, the ownership of Prudential had substantially changed due to changes in the identity of depositors and the amount of their deposits. The proxy materials were processed by the Bank Board under the provisions of amended Section 12(i) of the Exchange Act.

On January 27, 1976, a class action complaint was filed in the *Prudential* case on behalf of various groups of members of Prudential seeking to enjoin any vote on the conversion until an adequate disclosure was made or, in the alternative, damages. The complaint alleged the elements of a purchase or sale,[14] scienter[15] and causation,[16] as defined by recent pronouncements of this Court, and that the proxy statement was a false and misleading statement calculated to induce the membership to vote for a plan which was not in their interest and deceptive and fraudulent because, among other reasons, it failed to advise the new members that a vote for the plan would eliminate their equity in the company and confer it on prior members, many of whom had withdrawn their deposits. It is claimed that but for these misleading statements the members would not have voted for the conversion.

D. *Disposition in the Courts Below.*

The *Bank Board* case was an original petition in the Court of Appeals to review an order of the Bank Board permitting Prudential to convert. The Court of Appeals

[14]Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

[15]Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

[16]Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972).

dismissed the petition on the theory that there was no showing that the Bank Board had abused its discretion in permitting the conversion and the use of the proxy material.

The *Prudential* complaint was a class action under the antifraud provisions of the Exchange Act which was dismissed by the United States District Court for the District of Utah before any responsive pleading was filed. The Court of Appeals for the Tenth Circuit affirmed, on the theory that a challenge to an allegedly misleading proxy statement used in connection with a conversion was a collateral attack on the Bank Board's order reviewed in the *Bank Board* proceeding.

The combined effect of the Court of Appeal's *Prudential* and *Bank Board* rulings was to declare that any defects in disclosure in the conversion process to voting members of *Prudential* were effectively insulated from review by any state or federal court.[17]

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decisions, read at their narrowest, have the effect of declaring that in any instance where a federal agency has responsibility to review the merits of a proposal submitted for shareholder approval — specifically, any agency named in Section 12(i) of the Exchange Act — the investor's traditional right to the guarantees of informed corporate sufferage contained in section 14 of the Exchange Act and the proxy rules will

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[17]No state court remedy could lie in such situations to remedy the proxy violations because (i) the Exchange Act vests exclusive jurisdiction over violations in the federal courts, and (ii) Section 408 of the National Housing Act, as construed by the court of appeals, would make that court the sole forum for any litigation that could be construed to be a challenge to the conversion plan (including the proxy materials).

no longer exist. Any challenge to the adequacy of the proxy materials used in connection with the proposal necessarily will be viewed as a challenge to the substance of the proposal. As such, the materials will not be reviewed to determine whether they fully and fairly disclosed all material facts about the substance of the proposal to be voted upon. Rather, the materials will be appraised on the same basis as the proposal: Has the agency abused its discretion in permitting their use. If the agency acted within its authority, even if it was deceived by a proposal advanced by management, the investor will have no relief. He will now be safeguarded by the tender mercy of agencies whose primary concern is the health of financial institutions, not the rights of shareholders.

Such a wholesale and unprecedented reduction in the safeguards surrounding corporate sufferage is contrary to the decisions of this Court, which firmly establish that investors are entitled to full disclosure of all material facts before voting on any proposal, and that they must have access to the courts to enforce their rights.

The Court of Appeals, further, acted contrary to Congress' intent. In enacting Public Law 93-495 Congress intended to strengthen and safeguard, not abrogate, the rights of investors in financial institutions to full and fair disclosure. Congress never contemplated that the entire industry should be excused of any meaningful disclosure if some banking administrator, rather than the shareholders, approved the "merits" of a proposed transaction. Moreover, as a result of the Court of Appeals' decisions different proxy, disclosure and reporting standards would be established for different industries and a crazy quilt scheme of policies substituted for the uniform system Congress created.

POINT I

THE DECISIONS BELOW DIRECTLY CONFLICT WITH THIS COURT'S *BORAK* LINE OF AUTHORITIES

In *Tcherepnin v. Knight,* 389 U.S. 332 (1967), this Court held that interests such as Petitioners hold in Prudential are "securities" entitled to protection by the disclosure policy of the federal securities laws. In the landmark decision of *J. I. Case Co. v. Borak,* 377 U.S. 426 (1964), reaffirmed in *Mills v. Electric Auto-lite Co.,* 396 U.S. 375 (1970), this Court held that shareholders had a private right of action under the Exchange Act for false and misleading proxy materials. *Borak* and *Mills* were again reaffirmed in *TSC Industries Inc., v. Northway, Inc.,* 426 U.S. 438 (1976). And this Court has reiterated in its most recent pronouncements that the right of investors to receive full and fair disclosure of all material information necessary to their making informed decisions is the very essence of the federal scheme of protections. *Santa Fe Industries, Inc. v. Green,* 97 S. Ct. 1292 (March 23, 1977).

The court of appeals here effectively held that the Prudential shareholders could not challenge the misleading character of a proxy statement if the substantive proposal to be voted upon had been approved by the Bank Board. But *Mills* emphatically held that the right of the shareholders to full and non-misleading proxy materials existed even where a court had decided that the underlying transaction being voted on was "fair" to the investors. To hold otherwise, the Court noted, would be to substitute the judgment of some court about the fairness of the transaction for the shareholders' right to make their own decision about their company on the basis of all relevant information.

> The decision below, by permitting all liability to be foreclosed on the basis of a finding that the merger was fair, would allow the stockholders to be bypassed. . . . A judicial appraisal of the merger's merits could be substituted for the actual and informed vote of the stockholders. 396 U.S. at 381

The Tenth Circuit has done what this Court said was improper, declaring that if the relevant agency — here the Bank Board — found the transaction to be "fair" the proxy materials may not be challenged except on a showing of abuse of discretion in permitting their use.

As this Court observed in *Borak,* "[t]ime does not permit an independent examination of the facts set out in the proxy material" and the regulatory authority must "[accept] the representations contained therein at their face value" because the "unlawful manipulation would not have been apparent to the Commission until after merger." Nothing in the 1974 amendments to the National Housing Act or Section 12(i) of the Exchange Act purports to, nor indeed could, change that fundamental fact of corporate life upon which *Borak* was grounded. The error of the Court of Appeals is the more egregious in light of the fact that in the *Bank Board* case it was found that the notices given to members as part of the proxy materials were "an affirmative misleading statement" which "served to mislead the petitioners as to the proper course of action." A-14 Thus, despite this Court's *Borak* holding, the Court below ruled that even misleading statements were insulated from challenge by a shareholder if they had escaped detection in the process of administrative review.

It is no answer to say, as the Court of Appeals has done, that because the Bank Board had reviewed them an attack on the proxy materials is an attack on the substance of the transaction — that because the Bank Board

had authority to review and permit the underlying transaction an attack on the misleading proxy materials "in reality is a challenge to the Bank Board's decision although cast in terms of Rule 10b-5." A-8 The fact remains that it is ultimately up to the shareholders to approve the proposed transaction, even though the Bank Board or some other agency *or even a court* considers the transaction "permissible," "fair" or even "advisable."

This Court has recently stressed in *Piper v. Chris Craft Industries, Inc.*, 97 S. Ct. 926 (Feb. 23, 1977) that the entire philosophy of the securities laws is to protect the small investor, as distinguished from management or controlling persons, with full disclosure. That, at the very least, is the teaching of *Borak*, *Mills* and *TSC* dealing specifically with proxies. And the *Borak* reasoning about the efficacy of agency review applies at least equally here. What the Bank Board may consider sufficient disclosure in the abstract may prove, under close analysis in the context of all the facts and the investor's decision making process, to be wholly inadequate and misleading. It is that fact of life that underlies the *Borak-Mills* line of cases, and which the Court of Appeals has wholly ignored.

Public Law 93-495 established a procedure for direct court of appeals review of *orders* of the Bank Board concerning conversions, which procedure Petitioners in the *Bank Board* matter pursued to conclusion. But that procedure should not deny the *Prudential* Petitioners their right to challenge the adequacy of the *proxy materials*. A claim of denial of the rights of corporate suffrage is quite a different thing than a challenge to the propriety of the Bank Board's order permitting Prudential to convert *if* its shareholders so chose. The decision whether to *permit* the transaction was the Bank Board's, to be reviewed in the court of appeals; the decision whether to *effect* the transaction was that of the members of Prudential, to be protected by an action in the district court should the proxy materials soliciting that decision be materially false or misleading. Agency regulation and shareholders remedies are simply addressed to different though sometimes overlapping problems.

The application of the abuse of discretion standard vis-a-vis the Bank Board's decision to permit a conversion is a result which Petitioners may accept, but application of that standard to the proxy claims under the Exchange Act in *Prudential* has the effect of destroying the disclosure policy and the scheme of protection for investors so carefully devised by Congress and implemented by this Court.

It is one thing to create public agencies such as SEC and the Bank Board to act secondarily in the public interest, but quite another thing to say that secondary agency action will supplant entirely the rights of individuals to protect themselves. The Court of Appeals' decision has the latter effect and to that extent introduces an improper and unprecedented rubric in the field of securities law.

POINT II

THE COURT OF APPEALS DECISION CONFLICTS WITH CONGRESSIONAL INTENT

A. *The Denial of the* Prudential *Petitioners Action Under the Exchange Act Conflicts with Public Law 93-495.*

In enacting Public Law 93-495, which lifted the moratorium on conversions and amended Section 12(i) of the Exchange Act to transfer administration of the proxy provisions to the Bank Board, Congress clearly did not in-

tend to reverse the *Tcherepnin, Borak* and *Sante Fe* lines of cases as they apply to savings and loans and other federally supervised financial institutions. Yet, that is the reading given Public Law 93-495 by the Court of Appeals.

Prior to the 1974 amendment to Section 12(i), which added the Bank Board to the list of agencies entitled to administer, *inter alia,* the proxy provisions of the Exchange Act, Section 12(i) expressly provided that:

> The Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation shall have power to make such rules and regulations as may be necessary for the execution of the functions vested in them as provided in this subsection *and none of the rules, regulations, forms or orders issued or adopted by the Commission pursuant to this chapter shall be in any way binding upon such officers and agencies* in the performance of such functions, or upon any such banks in connection with the performance of such functions. (emphasis added)

The 1974 amendment did not merely add the Bank Board to the list of agencies in Section 12(i), it also added the following proviso which imposed an *ongoing* obligation on the listed agencies to adopt rules and regulations "substantially similar" to those of the SEC or explain the reason why.

> In carrying out their responsibilities under this subsection, *the agencies named in the first sentence of this subsection shall issue substantially similar regulations to regulations and rules issued by the* [*Securities and Exchange*] *Commission* under this section and sections [12, 13, 14(a), 14(c), 14(d), 14(f) and 16], unless they find that implementation of substantially similar regulations with respect to insured banks and insured institutions are not necessary or appropriate in the public interest or for protection of investors, and publish such findings, and the detailed reasons therefor, in the Federal Register within 120 days of October 18, 1974, and, thereafter, within 60 days of any changes made by the Commission in its relevant regulations and rules. (emphasis added)

The addition of this proviso to Section 12(i) testifies eloquently to Congress' concern that investors in financial institutions receive all the protections from false and misleading information provided by the SEC's rules and regulations and this Court's construction of them. Such a concern is flatly contrary to the result reached by the Tenth Circuit.

The legislative history surrounding the addition of this proviso is considerable, and confirms that Congress intended to strengthen the very protections which the Court of Appeals has summarily swept aside. Congress' concern was that owners of the equity in mutual savings and loans be fully apprised of all factors bearing on the proposed conversion and on the value of their interests in the association. Testimony before the Senate prior to adoption of the proviso[18] was to the effect that SEC-like proxy information was necessary if past problems of investor exploitation in the conversion process were to be avoided and the Bank Board undertook to provide such protection.

The Court of Appeals observed that the Bank Board had adopted proxy rules and regulations substantially similar ot those of the SEC, but then nullified their effect by holding that Bank Board review prevented their enforcement by the shareholders. In doing so it ignored the oft repeated holding of this Court that the laws con-

[18] *Hearings Before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs,* 93rd Cong., 2d Sess. (1974) e.g. at page 88, 188-89, 299 (statements of Sen. Proxmire and Thomas R. Bomar, Chairman of the Federal Home Loan Bank Board).

cerning securities regulation are to be read *in pari materia, e.g., SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963), along with the holding, reiterated many times, that these "companion legislative enactments embrace a 'fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus achieve a high standard of business ethics in the securities industry.' " *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972). The holding is irreconcilable, moreover, with holdings of this Court that the control exercised over proxies by other governmental agencies does not obviate the protection of the federal securities laws.[19] *E.g., SEC v. National Securities Inc.*, 393 U.S. 453 (1969).

The authority and responsibility of the Bank Board, or any of the other banking supervisory authorities listed in Section 12(i), for the accuracy and truthfulness of proxy materials under the Exchange Act is in no respect different from the authority and responsibility of the SEC. The proxy materials challenged in *Borak, Mills* and *TSC* had all been reviewed by the SEC. Their use was "permitted" by the SEC in exactly the same fashion and to the same extent as the use of the Prudential materials can be said to have been "permitted" by the Bank Board here. And it probably can be accepted as fact that the SEC is far more experienced and expert in such matters than the Bank Board. Nevertheless, in *Borak, Mills* and *TSC*, this Court recognized the implied shareholder right of action on those proxy materials.[20]

Such a departure from the fundamental policy of the

[19]The position adopted by the Court of Appeals is rejected by the leading commentators. *See* 2 BROMBERG, SECURITIES LAW §6.5(1) at footnote 92.

[20]This Court has recently observed that the views of an agency of acknowledged expertise, such as the SEC (or the Bank Board in this case), "is of limited value when the narrow legal issue is one peculiarly reserved for jduicial resolution." Piper v. Chris-Craft Indus., Inc., 97 S.Ct. 926, 949 n. 27 (1977).

securities laws is unnecessary, for the very statute relied upon by the Court of Appeals contains the following proviso:

> Nothing contained in this section . . . shall be interpreted or construed as approving any act, action or conduct, which is or has been or may be in violation of existing law. 12 U.S.C. §1730a(*1*).

B. *The Court Below Emasculated Section 27 of the Exchange Act.*

The emasculation of the securities laws with respect to the banking industry is evident in the holding of the Court of Appeals that provisions of the Exchange Act have no application to the standards by which proxy materials of banks are to be judged. Rather, the standard applied herein is only whether the agency has abused its discretion in permitting the use of the proxy material. A-17 That holding, coupled with the ruling that the exclusive remedy lies in the Court of Appeals review, effectively nullifies the following declaration of Congress in Section 27 of the Exchange Act:

> The district courts of the United States . . . shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions of law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. 15 U.S.C. §78aa

The Court of Appeals decisions operate to vest virtually unreviewable authority over such matters in banking agencies.

The Court of Appeals failed to cite a single authority holding that the federal court's "exclusive" jurisdiction is subject to any agency discretion — not even the

discretion of SEC,[21] which at least has responsibility for the enforcement of Rule 10-5.[22] The holding has the further effect of nullifying the provisions of the Exchange Act against representations that federal officials have "approved" schemes of management[23] and prohibiting

[21]Significantly, SEC has never asserted such a doctrine in its administration of proxy solicitations and, to the contrary, has affirmatively declared that the antifraud provisions apply to institutions precisely like Prudential. ***Amicus curiae*** Brief for SEC, Burrus, Cootes & Burrus v. MacKethan, 537 F.2d 1262 (4th Cir. July 21, 1976), ***vacated on rehearing***, 545 F.2d 1388. (4th Cir. 1976)

> Persons who are fraudulently induced to buy such certificates are entitled to the protections of the antifraud provisions, including the right to sue for damages. That a private right of action is available to defrauded investors under the antifraud provisions of the federal securities laws is firmly established, but we are not aware of, and appellants have not argued that there exists, a similar private right of action under the federal banking laws. Nor have appellants argued that such a right exists under the banking laws of the various states. And there is no compelling reason why entities like Norfolk should be permitted to sell these securities fraudulently. (footnote omitted)

[22]Administration of the antifraud provisions was specifically ***not*** transferred to the Bank Board under the amendments to Section 12(i) (15 U.S.C. §781). Indeed, Congress has affirmatively declared in connection with the antifraud provisions in Section 17(a) of the 1933 Act [15 U.S.C. §77q(c)]:

> The exemptions proved in section 3 [exempting saving and loan securitiesfr om registration provisions] shall not apply to the provisions of this section.

[23]The regulations which Congress required the Bank Board to adopt provide that schemes of mnaagement may ***not*** be ***"approved,"*** *see*, 12 C.F.R. 563b.5(*g*)(2):

> The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Corporation and authorized for use ***shall not be deemed a finding by the Corporation that such material is accurate or complete or not false or misleading, or that the Corporation has passed upon the merits of or approved any proposal contained therein.*** No representation contrary to the foregoing shall be made by any person. (emphasis added)

See also, 15 U.S.C. §78z. The "wilfull" violation of these provisions is criminal under 15 U.S.C. §78ff. Congress recognized the danger implicit in leading the public to believe that the federal government has passed on the merits of any issue:

> [C]are has been taken to prevent the public from being led to believe that the Federal Government under the proposed law passes upon the soundness of any security, and to represent that any security has been so approved as to its soundness is declared to be unlawful. SEN. REP. No. 47, 73rd Cong., 1st Sess. 2 (1933)

The Court of Appeals effected to avoid these provisions by simple double-talk to the effect that "the Bank Board had approved the plan and had apparently examined the proxy material, but of course, did not 'approve' it formally." A-6.

waivers of rights.[24]

The Court of Appeals read what was a simple transfer of administrative authority between two government agencies as authorizing the Bank Board to "[issue] its own regulations and [exercise] the authority given it by statute . . . independent of Section 14 of the Exchange Act" and eliminated the entire scheme of protection for investors by declaring that "[t]his was done under statutory authority given to the Board, and not derived from [the Exchange Act.]" A-9 That holding ignores the legislative history, reviewed in *Tcherepnin*, in which it was specifically recognized that the Exchange Act *does* apply to savings and loans.[25]

[24]Section 29(a) of the Exchange Act, 15 U.S.C. §78cc(a) provides that "[a]ny condition, stipulation, or provisions of this title or any rule or regulation thereunder . . . shall be void. In the face of that provision the Court of Appeals held that "as to the petitioners who made deposits after the closing date, little need be said except that they took subject to the announced change, and apparently upon an express waiver." In Wilko v. Swan, 346 U.S. 427 (1953) this Court observed that Congress had taken great pains to protect the rights of investors and had clearly expressed its intent to forbid the waiver of rights. ***See also*** Kaizer-Frazer Corp. v. Otis & Co., 195 F.2d 838 (2d Cir.,), ***cert. denied***, 344 U.S. 856 (1952).

[25]In Tcherepnin v. Knight, 389 U.S. 322 (1967) this Court noted that the legislative history surrounding the securities laws is clear that the savings and loan industry is subject to the antifraud provisions and quoted the statement of Mr. Houston Thompson, counsel to the House Committee on Interstate and Foreign Commerce at ***Hearings on H.R. 4314, Before the House Interstate and Foreign Commerce Committee***, 78th Cong., 1st Sess. 29-30 (1933):

> So we say that when they are covered by a division of the federal government that has supervision, then they shall file their information with that division, but not with the Federal Trade Commission.
> But when it comes to advertising the security then they must be responsive to these acts.
>
> We take the same position with respect to the Federal Reserve Board and the securities which come under its control.
>
> • • •
>
> But when it comes to advertising, anyone, no matter where they have filed other information, becomes responsive to the provisions of this bill, so far as advertising is concerned.

POINT III
THE OPINION CONFLICTS WITH AN OPINION OF THE NINTH CIRCUIT

The opinion presents a square conflict with the Court of Appeals for the Ninth Circuit — the only other circuit to consider depositors' claims in a reorganization plan approved by the Bank Board, to the extent that it denies any remedy to depositors. See *Elliott v. Federal Home Loan Bank Board,* 233 F. Supp. 578 (1964) *reversed on other grounds,* 386 F.2d 42 (9th Cir. 1967), *cert. denied,* 390 U.S. 1011 (1968). *Elliott* actually *invited* a shareholder suit such as was filed herein.

> Among the various kinds of relief which might have been requested by plaintiffs, was an injunction to prevent the consummation of the merger on September 10, 1963. 386 F.2d at 53

and at the footnote to the foregoing:

> Under some circumstances, shareholders aggrieved by a merger plan containing improper distribution provisions, might have a claim for damages for conversion against the surviving corporation. However, no such claims were asserted or litigated in the suits before us.

The Court of Appeals for the Tenth Circuit has thus denied the very remedy which the Court of Appeals for the Ninth Circuit declared must be pursued.

The opinion herein is in further conflict with *Elliott* with respect to whether the equity interests of depositors may be extinguished without their consent. *Elliott* squarely recognized that the rights of depositors were a "vested" interest in the company.[26] The opinion of the Court of

[26] Elliott v. Federal Home Loan Bank Bd., 233 F. Supp. 578, 591-598 (S.D. Cal. 1964), *rev'd on other grounds,* 386 F.2d 42 (9th Cir. 1967), *cert. denied,* 390 U.S. 1011 (1968).

The proposition was stated more explicitly in holdings of the trial court which were undisturbed on appeal:

> I am satisfied, and hold, that the Officers and Directors of the Asso-

Appeals herein *denied* such vested right with its cavalier declaration that:

> These petitioners held their interests in the mutual association subject to the vote of the majority . . . as are the rights of shareholders generally. A-18

No authority is cited for the proposition that equity rights of shareholders are subject to the whim of the majority. *Elliott* holds to the contrary as does ample authority in this Court. *E.g. Triegle v. Acme Homestead Ass'n,* 297 U.S. 189 (1936). *See also* Kauper, Constitutional Law (4th ed. 1972) 1390-1395.

POINT IV
THE OPINION BELOW HAS A BROAD IMPACT, DENYING INVESTORS IN VIRTUALLY ALL FINANCIAL INSTITUTIONS EFFECTIVE PROXY PROTECTIONS

The impact of the opinion of the Court of Appeals may well affect the entire banking industry. Even if limited to mutual savings and loan institutions, the impact would be staggering.

> ciation, and the Bank Board, or either of them, or the majority of the shareholders did not have the lawful power to alter the pro-rata rights of shareholders from that set forth in the law, the charter, and the Settlement Agreement which attempt to do so are void.
>
> * * *
>
> The Statute provided for the Association to be a *mutual* Association, and in a mutual Association preference cannot be given to one depositor or shareholder over another.
>
> * * *
>
> . . . such provision in the Agreement would nevertheless be void. This, for the reason that the majority stockholders cannot appropriate a minority shareholders' interest in property belonging to a corporation, to the detriment of minority stockholders.
>
> * * *
>
> I conclude that neither the majority of the shareholders, nor the officers and directors of Long Beach, nor the Bank Board, nor Equitable, acting singly or in concert, had the power to make the forfeitures and preferences as set forth in the contested provisions of the Merger Agreement; that such provisions are void, as a matter of law.

In 1972, when the Prudential plan was proposed, savings and loan institutions had a net worth of $11.567 billion and net after tax income of $1.263 billion.[27] Immediately prior to the passage of Public Law 93-495 there were in excess of 4,000 FSLIC insured savings and loan associations, 3,549 of which *were mutual,* with combined deposits of $174.5 billion.[28] By 1976, the year that the moratorium on conversions was lifted, the total number of savings and loans had remained relatively stable, but they had grown to net assets of $383 billion.[29] The industry is listed as the second largest holder of wealth in the country and "the mainstay of housing — the largest single sector of our economy."[30] In advertising their services savings and loans boast that they generate more than than $100 million daily, which is available to finance the new construction in this country.[31]

The Court of Appeal's decision, denying full proxy protections to all members of mutual savings and loans, thus would be of very significant national concern even if it applied *only* to conversions of mutual institutions to the stock form.[32] Some measure of the impact of these conversions can be gleaned from testimony of Bank Board officials during hearings on Public Law 93-495, when the

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[27] *Hearings Before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs,* 93rd Cong., 2d Sess. 79 (1974) (statement of Sen. Proxmire).

[28] *Id.* at 422.

[29] 10 FED. HOME LOAN BANK BD. J. 32 (April 1977).

[30] 7 FED. HOME LOAN BANK BD. J. 8 (December 1974).

[31] ABC, Monday Night Football, October 3, 1977 (advertisements of the Savings and Loan Foundation).

[32] This case differs in no material respect from any other conversion of a mutual to a stock form. The *Prudential* plan did involve "free stock" which may not be permitted in future conversions, but in no way distinguishes the conversion process, the proxy materials or the Bank Board's role from any other conversion. The "free stock" feature is merely another material feature which might affect the exercise of sufferage and therfore must be disclosed.

Bank Board estimated 50 "average" conversions per year of institutions representing $100 million each.[33]

But the decisions below are not limited to mutual savings and loans. The decisions have impact far greater than just upon mutual savings and loans, or even the entire savings and loan industry. All national banks supervised by the Comptroller of Currency, all member banks of the Federal Reserve System, and all banks insured by the Federal Deposit Insurance Corporation are also affected by the 1974 amendments of Public Law 93-495. Add their deposits to those of the savings and loan industry and the Court of Appeals decision has the potential of eliminating meaningful proxy disclosure and protection for investors in the entire banking community.

There are numerous situations in which the banking regulatory authorities must approve some course of action before it is permitted to be undertaken by a financial institution. In such contexts the Court of Appeals' decisions leave the millions of investors in these public insituations without effective proxy protection, critical to informed shareholder voting. At the same time, management of such financial institutions would be largely freed from the effective disclosure requirements upon which the securities laws so strongly rely to deter improper conduct.

CONCLUSION

The 1974 amendments to Section 12(i) of the Exchange Act were calculated to streamline the administration of the federal securities laws, not to abandon the time honored policy of protection to investors. Admin-

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[33] *Hearings Before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs,* 93rd Cong., 2d Sess. 85 (1974) (information received from the Federal Home Loan Bank Board).

istration of the securities laws as to savings and loan institutions was transferred to the Bank Board to conform with the practices as to commercial banks which was instituted in 1964. The manner in which the Court of Appeals has construed those statutory changes flatly conflicts with the decisions of this Court and is contrary to Congress' clear intent. Moreover, the decisions, made in the context of mutual to stock conversions and directly applicable to over 3500 institutions having billions of dollars in assets, will also have effects on investors in national banks and federally insured state banks, for both categories of institutions are affected by the transfer of authority contained in section 12(i) of the Exchange Act.

For the foregoing reasons, this Court should grant the writ as prayed.

Respectfully submitted,

October 20, 1977

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Appendix

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APPENDIX A

JULY TERM - JULY 22, 1977

Before The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., The Honorable Robert H. McWilliams, The Honorable James E. Barrett, and The Honorable William E. Doyle, Circuit Judges, and The Honorable Ewing T. Kerr, Senior District Judge.

L. J. HARR, JEANNE HARR, LAWRENCE J. ECHOHAWK, ED FULTON, DIANE FULTON, DON HUTCHISON, C. GERALD PARKER, DONALD DREW, CARRIE DREW, and DOUGLAS McGREGOR, *Petitioners,* vs. FEDERAL HOME LOAN BANK BOARD, an Agency of the United States, *Respondent.* PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, *Intervenor.*	No. 76-1109
JEANNE HARR and L. J. HARR, for and on behalf of themselves and all others similarly situated, *Plaintiffs-Appellants,* vs. PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, *Defendant-Appellee.*	No. 76-1300

This matter comes on for consideration of the petitions for rehearing and suggestion for rehearing en banc filed by the petitioners-appellants in the captioned cases.

Upon consideration whereof, the petitions for rehearing are denied by Circuit Judges Seth and Barrett, and District Judge, Kerr to whom the cases were argued and submitted.

The petitions for rehearing having been denied by the original panel to whom the cases were argued and submitted and no member of the panel or judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure the suggestion for rehearing en banc is denied.

The Honorable David T. Lewis, Chief Judge, did not participate in the consideration of these petitions for rehearing.

HOWARD K. PHILLIPS, Clerk

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1300

JEANNE HARR and L. J. HARR, for and on behalf of themselves and all others similarly situated,

Appellants,

v.

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellee.

Appeal From The United States District Court
For The District of Utah
Central Division

(D. C. # C-76-28)

Parker M. Nielson, Salt Lake City, Utah (Howard S. Landa, and A. Reed Reynolds, Salt Lake City, Utah, with him on the Brief), for Appellants.

Richard W. Giauque, of Berman & Giauque, Salt Lake City, Utah (Douglas J. Parry and Randall L. Dunn, Salt Lake City, Utah, with him on the Brief), for Appellee.

Before SETH and BARRETT, Circuit Judges, and KERR, Senior District Judge*.

*Of the District of Wyoming, Sitting by Designation.

SETH, Circuit Judge.

The plaintiffs brought this action against the Prudential Federal Savings and Loan Association, asserting that they were depositors in the mutual association. The allegations were that a plan to convert to a stock association was part of a conspiracy by the directors to benefit themselves and the officers; that the plan was unfair and itself deceptive; that the proxy material was deceptive; and that Rule 10b-5 of the Securities and Exchange Commission was violated. The complaint also alleged that regulations of the Federal Home Loan Bank Board were disregarded. The prayer was for injunctive relief or for damages in an unspecified amount.

The trial court on a motion by defendants entered an order dismissing the complaint for lack of subject matter jurisdiction. Plaintiffs have taken this appeal. See also the opinion in Harr et al. v. Federal Home Loan Bank Board, ... F.2d .... (10th Cir.) (No. 76-1109), filed this date.

As above described, the plaintiffs-appellants were depositors in a federally chartered mutual savings and loan association created under 12 U.S.C. § 1464(b)(1). The association created a plan to convert from a mutual association into a stock association, but retaining its federal charter. The depositors as of a stated date would receive "free stock" in the new entity. The conversion was permitted under section 5(i) of the Home Owners' Loan Act of 1933 (15 U.S.C. §§ 1461 et seq.), and the National Housing Act (12 U.S.C. §§ 1701 et seq.). *See also* 1974 U.S. Code Cong. & Ad. News, 6119, 6136.

This case concerns especially changes made in 1974 in the Housing Act and also in section 12 of the Exchange

Act made by Public Law 93-495. These changes placed the responsibility for supervision of proxy solicitations used in conversions, such as the one here concerned, with the Federal Home Loan Bank Board. The Bank Board by this Act was directed to adopt regulations covering the subject similar to those of the Securities and Exchange Commission. This was done by the Bank Board. *See* 12 C.F.R. §§ 563b.1 et seq. These regulations as to proxy solicitation are almost identical to SEC Regulation 14A which contains a specific antifraud subsection. It must be assumed that the private remedies available under SEC 14A as to fraud also exist under the counterpart Bank Regulations.

The appellants in their brief describe the issues essentially as being:

1. Whether the depositors in an association such as Prudential who assert that the conversion plan and proxy material "arbitrarily converted their pro-rata ownership . . . for the benefit of other unentitled persons, may seek redress under the federal securities laws."

2. Whether an appeal from the Bank Board's decision to allow a conversion is the exclusive remedy for an "aggrieved shareholder."

3. Whether the Bank Board can extinguish property interests without compensation.

The appellants also assert that: "The gravamen of the complaint was that the conversion plan and proxy materials were fraudulent securities transactions. . . ."

The trial judge, as mentioned above, dismissed the complaint for lack of subject matter jurisdiction for the reason that the action was a challenge to the Bank Board's decision and the exclusive remedy was an appeal of its

ruling, per 12 U.S.C. §§ 1730a(k) and 1725j(4). On this appeal, the appellants basically urge that the powers vested in the Bank Board as to plans for conversion and as to proxy solicitations do not alter this remedy under SEC Rule 10b-5. Appellants have filed a petition to review the Bank Board's decision on the conversion, apparently under 12 U.S.C. § 1725j(4). See case No. 76-1109 in this court, handled as a companion case.

The trial court in substance held that 12 U.S.C. § 1725j(4) (as amended in 1974, Public Law 93-495) as it refers to 12 U.S.C. § 1730a(k), creates an exclusive remedy for the cause here asserted by the plaintiffs — an exclusive remedy to review a determination by the Bank Board.

The appellants argue that the conversion plan was a wrongful taking of their interest as depositors in the mutual association; that it was for the interest and benefit of the officers and directors of the Association. They also urge that the proxy materials were inadequate and constituted a fraud. The attack is thus directed to the "plan" and the proxy solicitation. The Bank Board had approved the plan and had apparently examined the proxy material, but, of course, did not "approve" it formally. Conversions of this nature had been permitted by Congress in the initial legislation in 1948, and was again allowed, after a moratorium, by legislation referring particularly to this Association and to several others which had applications of long standing.

Section 402(j)(4) provides in part that: "Any aggrieved person may obtain a review of a final action of the Federal Home Loan Bank Board which approves . . . a plan of conversion . . . only by complying with the provisions of subsection (k) of section 1730a of this title. . . ." Thus section 402 provides clearly the procedure for review. Section 1730a(k) provides that the petition for review to the Court of Appeals ". . . shall be exclusive, to affirm, modify, terminate, or set aside, in whole or in part the order of the corporation." (A subsection follows (1) stating that nothing contained in the section shall approve prior violations. The appellant argues that this is significant here, but we must disagree.)

Thus does this statutory provision for a remedy by review exclude the remedy sought by plaintiffs which they assert is a regular Rule 10b-5 claim? From the references to the basis for the claim which is described above and from the issues presented as described in plaintiffs' brief, we must hold that the cause of action, no matter how otherwise described, must in the first instance be a challenge to the approval by the Bank Board of the plan of conversion, and the consideration of the proxy materials. It is "The Plan" itself which is the real basis for the arguments advanced here by plaintiffs. The attempted reliance on Rule 10b-5 is at best a secondary or derivative position. It is based on the consequences or impact of the plan on plaintiffs. The regulations of the Bank Board as to proxy solicitation clearly extend to the proxy materials and events here concerned (12 C.F.R. § 563b.5). 12 U.S.C. § 1730(1)(5) authorizes the Board to so prescribe the form, to regulate and to control proxy statements. The Bank Board, following a study of Prudential's proxy solicitation material, determined and advised Prudential that it was in accordance with the Board's conversion regulations and thus "authorized" its use. Thus the proxy solicitation by Prudential was controlled by the Bank Board pursuant to statute and its regulations during the process of conversion, and in any event at all times prior to registration of the stock on July 15, 1976.

The complaint is directed to matters which are part and parcel of the plan of conversion approved by the Board. The plan itself is complained of as being unfair and "arbitrarily" having converted plaintiffs' interest in the mutual association to a stock ownership also and for the benefit of others. This can be nothing more than an assertion that the plan is wrong and should not have gone into effect. It could only be operative upon the Bank Board's approval.

The Prudential Association and the Bank Board and the Plan cannot be separated as it is the sum which has the impact complained of. As the matter now stands, the approval of the Board must somehow be first set aside before the plaintiffs can proceed as they here argue. The asserted Rule 10b-5 claim is wholly a consequence of the Board's approval of the plan.

It does not make much difference whether this is called an exhaustion of administrative remedies, or whether it is viewed as what in reality is a challenge to the Bank Board's decision although cast in terms of Rule 10b-5. The consequences are the same, and we must affirm the trial court. The subject matter, the nature of plaintiffs' claim, and the arguments before this court demonstrate that the relief sought can only be afforded by a challenge to the Bank Board's action as the basic decision and authorization for the acts and consequences complained of. Anything else would be directed to derivative and secondary matters, and would, for all practical purposes, be a collateral attack on the decision. The statutory provisions are directed to this end and we hold that the remedy created is exclusive under these circumstances.

The decisions of this court in Bank of Commerce v. Board of Governors of Federal Reserve System, 513 F.2d

164 (10th Cir.), and Bank of Commerce v. Smith, 513 F.2d 167 (10th Cir.), apply the same doctrine as to the consequences of the express provision by Congress of a remedy. As the Supreme Court in *Whitney National Bank* said, there is a ". . . specific statutory scheme for obtaining review." *See also* First National Bank of St. Charles v. Board of Governors, 509 F.2d 1004 (8th Cir.).

As we have stated above, the sole thrust of plaintiffs' argument is directed to what in reality was the agency decision. This attack cannot be changed in its substance by a Rule 10b-5 gloss in what is really a collateral proceeding directed to derivative matters or consequences. The fact that the complaint is directed to such derivative consequences, of course, indicates that it is a collateral attack.

The court in Fort Worth National Corp. v. Federal Savings & Loan Ins. Corp., 469 F.2d 47 (5th Cir.), in a case arising under the National Housing Act and concerning the acquisition of an association by a one-bank holding company, considered this issue. There was final agency action in the Bank Board's order, and the court considered 12 U.S.C. § 1730a(k) in relation to the jurisdiction assumed by the district court. The appellate court said:

> "When Congress has prescribed a particular method of review, that procedure is exclusive. (Citing Whitney National Bank in Jefferson Parish v. Bank of New Orleans, 379 U.S. 411, and other cases). By specifying that appeals under section 1730a(k) were to be filed in the Courts of Appeals, Congress expected to prevent conflicting rulings and duplicative proceedings that inevitably would result from permitting collateral attack of Corporation orders in the various district courts. . . ."

The exclusive remedy is thus as provided in 12 U.S.C. § 1730a(k), the trial court concluded. Thus we need not proceed further to consider the other matters sought to be raised on this appeal.

AFFIRMED.

APPENDIX C

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1109

L. J. HARR, JEANNE HARR, LAWRENCE J. ECHOHAWK, ED FULTON, DIANE FULTON, DON HUTCHISON, C. GERALD PARKER, DONALD DREW, CARRIE DREW, and DOUGLAS McGREGOR,

Petitioners-Appellants,

v.

FEDERAL HOME LOAN BANK BOARD,
an agency of the United States,

Respondent-Appellee,

and

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Intervenor.

Petition for Review of Order of Federal Home Loan Bank Board

(No. 75-1164)

Howard S. Landa, Salt Lake City, Utah (Parker M. Nielson, and A. Reed Reynolds, Salt Lake City, Utah, with him on the Brief), for Petitioners.

Daniel J. Goldberg, Acting General Counsel, Federal Home Loan Bank Board, Washington, D.C. (Harold B. Shore, Associate General Counsel, Harvey Simon, Senior Trial

Attorney, and Roland L. Marcotte, Jr., Attorney, Federal Home Loan Bank Board, Washington, D.C., with him on the Brief), for Respondent.

Richard W. Giauque, Salt Lake City, Utah (Douglas J. Parry, and Randall L. Dunn, Berman & Giauque, Salt Lake City, Utah, with him on the Brief), for intervenor.

Before SETH and BARRETT, Circuit Judges, and KERR, Senior District Judge*.

SETH, Circuit Judge.

This is a petition for review of order No. 75-1164 of the Federal Home Loan Bank Board, and is filed pursuant to 12 U.S.C. § 1730a(k). The order approved a plan whereby Prudential Federal Savings and Loan Association, a federally chartered organization, would become a federally chartered stock association. See also the opinion of this court in Harr v. Prudential Savings & Loan Ass'n, ... F.2d .... (10th Cir.), (No. 76-1300), decided this date. This conversion was sought under Section 402(j) of the National Housing Act (12 U.S.C. § 1725(j)). The approved plan provided for the issuance, without charge, of shares of stock to depositors as of July 13, 1972.

The petitioners are two depositors who had savings balances on July 13, 1972, and who increased the balances after that date; they are four depositors who made their first deposits after July 13th, and the other petitioners apparently are borrowers from Prudential.

*Of the District of Wyoming, Sitting by Designation.

The petitioners urge that the conversion plan was unfair in that it was operative on April 15, 1976, but the stock distribution was to depositors as of July 13, 1972. They also urge that the conversion by the issuance of "free" stock was improper, and they particularly argue that the proxy solicitation material was misleading and false. Petitioners also assert that there was no authority whereby their interests as depositors in a mutual association could be converted into the form of stock.

The Bank Board and the Intervenor assert that this review of the Board's order should not proceed because the petitioners did not file objections to the conversion plan while it was under consideration by the Bank Board. There is no showing in the record that any objections or comments were so filed.

It is obvious that administrative remedies must be exhausted under virtually all instances where judicial review is sought. This Circuit has so held in several cases. *See* Bank of Commerce v. Board of Governors of Federal Reserve System, 513 F.2d 164 (10th Cir.), and Bank of Commerce v. Smith, 513 F.2d 167 (10th Cir.). These cases, of course, are related to the *Whitney National Bank* decision. This court has also applied the doctrine in other types of litigation, as Garvey v. Freeman, 397 F.2d 600 (10th Cir.). This doctine is based on the assumption that the officials and agencies in the administrative chain should have an opportunity to consider the issues and claims and to so exercise their discretion before the matter is submitted to the courts. The administrative expertise is so directed to the particular points sought to be raised and an adequate record is developed. The interested parties in ordinary circumstances also have the responsibility to determine the proper procedure.

We must hold in this review that the doctrine described above is not applicable because of the unusual circumstances. We have examined the several notices which were sent to depositors or published by Prudential at the direction of or under the Bank Board regulations. These notices are adequate to advise the depositors that a plan of conversion was submitted. The August 15, 1975, notice advised the depositors that they could file objections, although it is not clear with whom the filing should be made. The notices are adequate to put the depositors on notice of a change, but the notices are misleading as to a remedy. This is not an instance of silence as to possible remedy, but an affirmative misleading statement, the statement being that court review would be available. This was an unconditional statement that such a remedy could be used, and no conditions were expressed. This, together with the time lapses, served to mislead the petitioners as to the proper course of action.

Under these circumstances, if an agency is to urge the application of this type of exhaustion doctrine here described to preclude court review, it cannot advise the interested parties, as it did here, that there is an unconditional right to court review. Again, this is not an instance of silence, but affirmative advice which was wrong.

From this we must conclude that the petitioners may proceed with this petition for review. They have advanced apparently all the issues they wish to raise, and the Board and the Intervenor have met them. The notices were adequate in all other respects.

The Board approved the conversion plan as having met the statutory requirements and as being permitted under the grandfather provisions in the final amendments. Thus the issuance of "free" stock by Prudential was au-

thorized by the legislation. The "free" stock aspect of the conversion was contrary to any overall policy established by Congress, but, as indicated, was authorized in a few specific instances. The plan was approved by the Bank Board as fair and reasonable in all respects as the exercise of its discretion. We find nothing in the legislation to indicate that approval was mandated by Congress. We also hold that this was done in conformance with the enabling legislation. Within the scope of our review, we find no abuse which would cause us to set aside the plan as it was approved, or otherwise modify it.

It is obvious that the lapse of time between the original application and final approval cause several problems. These were no more than "problems," and were not of such a nature as to invalidate the conversion plan. The record date of July 13, 1972, was mandated by Congress for this conversion. Notice had been given on August 10, 1972, that the Board of the Association had decided to convert. The legislative history shows that Congress felt it necessary, despite the delay, to stay with the July 13, 1972, date because of the unfairness which could result from depositors increasing their deposits after the date, or which could come about from new deposits made to speculate on the possibility of the stock issue. Congress also considered the possibility that some depositors, who had made deposits after the record date, would withdraw them when they otherwise would not have done so in reliance on the established date. But in any event, it is clear that the record date was so established by Congress. It is not persuasive to argue that Prudential did not have to proceed with the conversion. Clearly it did not have to do so, but it was the decision of management and ultimately of the depositors and borrowers. This was permitted by statute and regulations.

Another consequence of the delay between the time the plan was filed and the conversion was the fact that depositors who had become such after the record date were solicited and voted their proxies. The number of such new depositors is not indicated in the record; however, we do not see how the petitioners can complain of this. It again was a by-product of the resolution of the record date problem by Congress. It was within the approval of the plan, and there is no showing that it was prejudicial to petitioners. Apparently several of the petitioners are such "new" depositors. At the Association meeting on March 5, 1976, there were 1,328,997 votes of members cast on the conversion question; of this vote 1,176,199 voted for the conversion. A majority of the "outstanding" votes (1,694,229) was required for approval; thus about sixty-nine percent of the total eligible vote was cast in favor of conversion.

The petitioners argue that the Bank Board did not have exclusive authority over the approval of the plan of conversion, and particularly over the proxy solicitation. Petitioners assert that the matter was in part governed by the Securities Acts.

As we have pointed out above there was specific legislation relating to conversion of this nature, and giving the Bank Board the authority to approve or disapprove, and generally to exercise their existing supervisory authority over such changes. The consideration of a plan for conversion cannot be separated from the proxy solicitation and proxy material. All of this package was well within the supervisory authority of the Board during all times material to this case.

The Bank Board was directed by 15 U.S.C. § 781(i) (Public Law 93-495) to supervise and administer proxy

solicitation, among other things, during the conversion process. This legislation accomplished a transfer of this authority from the SEC to the Bank Board. The Board issued its own regulations and exercised the authority given it by statute in the consideration and authorization of the proxy material. These regulations are independent of section 14 of the Exchange Act. The National Housing Act, 12 U.S.C. § 1725 (j)(1), authorizes the Bank Board to issue rules as to conversions. These regulations, in the form here concerned, were issued on February 28, 1974. The solicitation and vote took place before March 5, 1976.

Thus the Bank Board had exclusive authority to regulate the conversion including the proxy solicitation. This was done under statutory authority given to the Board, and not derived from other Acts as petitioners urge. We find no defect in the procedure or exercise of supervisory authority in this respect to warrant the relief requested by petitioners.

The petitioners direct much of their argument to the proxy material and the proxy solicitation. The Bank Board asserts that, based upon "a careful staff study of Prudential's proxy solicitation material . . . ," it determined that this material and statement were in accordance with the regulations, and the Board "authorized" the "use" of this material.

It would not seem useful to discuss each of the many points raised as to the adequacy of the proxies and as to the asserted misleading material. We have examined the points and the record carefully and we find no omission or misleading statement sufficient to warrant the relief suggested.

The petitioners urge also that their rights of property were changed by the conversion. As to the petitioners who were depositors before the closing date, their interests were changed from that of a depositor in a mutual association to that of a stockholder in a stock association. This change was one authorized by law upon the proper vote of the depositors. These petitioners held their interests in the mutual association subject to the vote of the majority as provided by regulation. Their rights were thus at all times subject to this possibility as are the rights of shareholders generally.

As to the petitioners who made deposits after the closing date, little need be said except that they took subject to the announced change, and apparently upon an express waiver.

The relief requested by the petitioners is denied, and the petition for review is dismissed.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. C-76-28

JEANNE HARR and L. J. HARR, for and on behalf of themselves and all others similarly situated.

v.

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Defendant.

ORDER

The matter came before the Court on February 11, 1976 on Plaintiffs' Motion for Temporary Restraining Order And For Order to Show Cause Why A Preliminary Injunction Should Not Be Issued, and on Defendant's Motion to Dismiss. Parker M. Nielson and Howard S. Landa appeared for plaintiffs; Richard W. Giauque appeared for defendant Prudential Federal Savings and Loan Association; and J. Thomas Greene specially appeared on behalf of the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation. After reviewing the pleadings and papers filed and having heard arguments of counsel, the Court made the following rulings:

IT IS HEREBY ORDERED that:

(1) Plaintiffs' Motion for Temporary Restraining Order And For Order to Show Cause Why A Preliminary Injunction Should Not Be Issued is hereby denied.

(2) Defendant's Motion to Dismiss for lack of subject matter jurisdiction is hereby granted, the applicable statutes providing that the U.S. Court of Appeals has exclusive jurisdiction of the matters involved (§§ 402(j)(4) and § 408(k) of the National Housing Act, 12 U.S.C. §§ 1725(j)(4) and 1730a(k).

(3) The Complaint and this action are hereby dismissed with prejudice, the parties to bear their own costs.

ENTERED this 12th day of February, 1976.

WILLIS W. RITTER,
Chief Judge
United States District Court

APPROVED AS TO FORM:

Parker M. Nielson
Attorney for Plaintiffs

Richard W. Giauque
Attorney for Defendant